

1992

## D. Udell v. Dan Whiting : Brief of Appellant

Utah Court of Appeals

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Dan Whiting; pro se.

Ronald H. Goodman; attorney for appellant.

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IN THE UTAH COURT OF APPEALS

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D. UDELL,

)

Plaintiff-Appellant,

Case No. 920451 A

vs.

)

DAN WHITING,

Defendant-Appellee.

)

---

BRIEF OF APPELLANT

Appeal from a final Judgment entered in a civil action  
in the Fourth Circuit Court in and for Utah County, State of Utah,  
Judge Joseph I. Dimick.

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Payson, Utah 84651

Pro Se Appellee

IN THE UTAH COURT OF APPEALS

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LEONARD D. UDELL,

Plaintiff-Appellant,

vs.

Case No. 920451 A

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TABLE OF AUTHORITIES

STATUTE CITED

Utah Code Annotated, Section 70A-3-607

STATEMENT OF THE ISSUE

DID THE TRIAL COURT ERR AS A MATTER OF LAW IN RULING THAT PLAINTIFF-APPELLANT'S NEGOTIATION OF THE \$1,600 CHECK RESULTED IN AN ACCORD AND SATISFACTION BETWEEN PLAINTIFF AND DEFENDANT, THEREBY PRECLUDING PLAINTIFF FROM BEING ABLE TO COLLECT THE REMAINING \$3050 OWED, PLUS INTEREST AND ATTORNEY'S FEES?

STANDARD OF REVIEW

THE STANDARD OF REVIEW FOR THIS COURT WOULD BE TO DETERMINE IF THE TRIAL COURT WAS CLEARLY ERRONEOUS IN FINDING BY A PREPONDERANCE OF THE EVIDENCE IN THE CIVIL ACTION THAT AN ACCORD AND SATISFACTION HAD RESULTED. THE SUPPORTING AUTHORITY WHICH APPELLANT BELIEVES DETERMINATIVE OF THIS ISSUE IS UTAH CODE ANNOTATED, SECTION 70A-3-607.

STATUTE

Utah Code Annotated, Section 70A-3-607, " The negotiation of an instrument marked "paid in full," "payment in full," "full payment of a claim," or words of similar meaning, or the negotiation of an instrument accompanied by a statement containing such words or words of similar meaning, does not establish an accord and satisfaction which binds the payee or prevents the collection of any remaining amount owed upon the underlying obligation, unless the payee personally, or by an officer or employee with actual authority to settle claims, agrees in writing to accept the amount stated in the instrument as full payment of the obligation."

IN THE UTAH COURT OF APPEALS

-----

LEONARD D. UDELL,

)

Plaintiff-Appellant,

vs.

)

CASE No. 920451-A

DAN WHITING,

Defendant-Appellee.

)

-----

JURISDICTION

This appeal is from a final judgment entered in a civil action in the Fourth Circuit Court, State of Utah, County of Utah, American Fork Department. The specific rule conferring jurisdiction on this Appellate Court is Rule 3(a) U.R.A.P., because this is an appeal from a circuit court.

STATEMENT OF THE CASE

Plaintiff Leonard D. Udell filed an action in Circuit Court against defendant Dan Whiting to attempt to recover amounts claimed owed on four promissory notes, which defendant signed for the purchase of certain equipment (Page 1 of the Record). Mr. Udell was claiming that \$3,350 in total, plus interest and attorney's fees, was owed on the four notes. Mr. Dan Whiting represented himself at the nonjury trial held on May 13, 1992, the Honorable Joseph



I. Dimick presiding, while Leonard D. Udell was represented by counsel. Judge Dimick entered his ruling on June 16, 1992, finding for the defendant, Mr. Whiting, no cause of action for the plaintiff (Page 9 of the Record). Mr. Udell appeals from such ruling (Page 10 of the Record).

#### STATEMENT OF THE FACTS

Over a period of two months in 1988, defendant Dan Whiting made four purchases from plaintiff Leonard D. Udell, of certain equipment owned by Mr. Udell, and signed a promissory note for each purchase (Page 3, Lines 3-12 of the Transcript). The terms of the four notes were as follows:

A. First note--Signed February 11, 1988, for \$2200. If the amount was not paid within 90 days, there would need to be interest accruing at ten percent (Page 5, Lines 20-25, and Page 6, Lines 1-7 of the Transcript).

B. Second note--Signed February 11, 1988, for \$350. Interest would be at the rate of one percent per month (Page 7, Lines 10-18 of the Transcript).

C. Third Note--Signed March 7, 1988, for \$2500. The interest would be at ten percent if not paid within three months (Page 8, Lines 3-25, and Page 9, Lines 1-9 of the Transcript).

D. Fourth Note--signed April 14, 1988, for \$250 (Page 10, Lines 16-21 of the Transcript).

The total owed to Mr. Udell by Mr. Whiting on the four notes was \$5200.

Mr. Whiting did not make payment on the notes in a timely manner. From evidence produced at trial, it was found that Mr. Whiting had paid a total of \$2,150 to Mr. Udell, leaving a balance owed of \$3050, plus interest and attorney's fees (Page 21, Lines 2-7; Page 39 Line 25; and Page 40, Line 1 of the Transcript).

Mr. Whiting did send Mr. Udell a letter and a check for \$1,600 on December 23, 1991. Mr. Whiting wrote on the check "Payment in full as per letter 12/23/91," and indicated in the accompanying letter that acceptance of the check reflected agreement by Mr. Udell that he had been paid in full (Page 10, Lines 3-6; and Page 19, Lines 7-21 of the Transcript). Mr. Udell cashed the \$1,600 check (Page 19, Lines 22-24 of the Transcript), by endorsing it with his signature, but made no acknowledgment to Mr. Whiting that the total debt had been satisfied. Mr. Udell cashed the check after being informed of the Utah Code statute permitting the negotiation of a check prior to suing for the balance owed (Page 41, Lines 11-19 of the Transcript).

## SUMMARY OF ARGUMENT

BASED UPON UTAH CODE ANN., SECTION 70A-3-607, APPELLANT UDELL'S NEGOTIATION OF APPELLEE WHITING'S CHECK WAS NOT AN ACCORD AND SATISFACTION, AND HE SHOULD NOT BE PRECLUDED FROM COLLECTING THE REMAINING AMOUNTS OWED ON THE FOUR NOTES.

## ARGUMENT

Utah Code Annotated, Section 70A-3-607, states the following:

The negotiation of an instrument marked "paid in full," "payment in full," "full payment of a claim," or words of similar meaning, or the negotiation of an instrument accompanied by a statement containing such words or words of similar meaning, does not establish an accord and satisfaction which binds the payee or prevents the collection of any remaining amount owed upon the underlying obligation, unless the payee personally, or by an officer or employee with actual authority to settle claims, agrees in writing to accept the amount stated in the instrument as full payment of the obligation.

From the evidence adduced at trial, it appears that Mr. Udell negotiated the check only after being advised of the contents of the above statute. Relying on said statute, he did cash the \$1,600 check tendered him by Dan Whiting, then sued to collect the balanced owed. There was no meeting of the minds, a necessary element for an accord and satisfaction, that payment in full had been made, because Mr. Udell rightfully believed

that he could still collect remaining amounts owed. Section 70A-3-607 clearly states this right available to him.

Section 70A-3-607 clearly appears to be determinative of the facts of this case. Mr. Whiting had marked on the instrument, the \$1,600 check to Mr. Udell, "Payment in full," and his accompanying letter stated that accepting the check would reflect that payment in full had been made. Mr. Udell did negotiate the check by endorsing it and cashing it. However, Section 70A-3-607 specifically states that such actions by the payee do not establish an accord and satisfaction, and that the payee may collect the remaining amounts owed, unless the payee agrees in writing to accept the stated amount in the instrument as payment in full.

The mere fact that Mr. Udell cashed the check did not preclude him from suing for remaining amounts owed because he did not agree in writing to accept the check as full payment of his claims. Section 70A-3-607 permits him to cash the check and then attempt to collect the rest.

The trial judge appeared to make his ruling that an accord and satisfaction had occurred based upon the fact that Mr. Udell had put his signature on the back of the check; thus

according to the judge's thinking, satisfying the requirement of 70A-3-607 that the payee needs to agree in writing to accept the amount stated in the instrument as payment in full (Page 22, Lines 12-25; Page 23, Lines 1-25; and Page 24, Lines 1-20 of the Transcript).

To interpret the statute as the trial judge appears to do so would almost completely strip 70A-3-607 of its authority. The only way by which Mr. Udell could negotiate the check was by signing his name on the back. He negotiated the check, but no accord and satisfaction was reached. Section 70A-3-607 states that the negotiation of such an instrument as the check which is marked payment in full does not establish an accord and satisfaction. The intent of the statute is that there must be some separate agreement in writing by the payee for an accord and satisfaction to be reached, not the written signature to negotiate the check. Mr. Udell made no such separate agreement.

The statute cited does appear to contradict prior law regarding the cashing of checks by payees which payors had marked "payment in full." Yet this statute became the law in this jurisdiction in 1990, and was in effect when the events of this case transpired. It should be honored and given its proper interpretation.

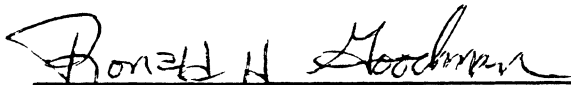
### CONCLUSION

The interpretation of Section 70A-3-607 is determinative of this case, as indicated in the trial judge's remarks (Page 39, Lines 19-25, and Page 40, Line 1 of the Transcript). The amounts paid against the original amount are not in dispute.

Based upon the foregoing argument, the plaintiff appellant requests this Court to find the trial Court's ruling erroneous, that it is not supported by the facts, that the trial Court's ruling be reversed, and that judgment enter in favor of appellant and against appellee as follows:


1. For the sum of \$3,050;
2. For interest on the above sum in an amount to be determined from the date of the indebtedness, at the legal rate;
3. Attorney's fees, as provided for by each of the Promissory notes, in a reasonable amount.
4. For such other and further relief as to the Court seems just in the premises.

DATED this 15 day of October, 1992.

  
\_\_\_\_\_  
RONALD H. GOODMAN  
Attorney for Plaintiff-Appellant

CERTIFICATE OF SERVICE

I hereby certify that I mailed four true and correct copies of the foregoing brief of plaintiff-appellant postage prepaid in the U.S. Mail this 15 day of October, 1992, to Dan Whiting, 4692 West 10000 South, Payson, Utah 84651

A handwritten signature in cursive script, appearing to read "Ronald H. Goodman", is written over a horizontal line.

RONALD H. GOODMAN

Attorney for Plaintiff-Appellant

A D D E N D U M

Page

- |   |                 |
|---|-----------------|
| 1. Copy of the Ruling                             | iv              |
| 2. Copies of the four promissory notes            | v,vi,vii & viii |
| 3. Copy of Utah Code Annotated, Section 70A-3-607 | ix              |



FOURTH CIRCUIT COURT, STATE OF UTAH  
UTAH COUNTY, AMERICAN FORK DEPARTMENT

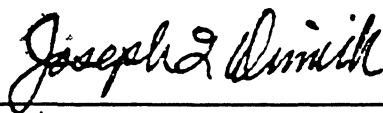
LEONARD D. UDELL,	)	RULING
	)	
Plaintiff,	)	
	)	
vs.	)	
	)	
DAN WHITING,	)	Case No. 920000339
	)	
Defendant.	)	

---

After considering the evidence, the Court finds the Plaintiff's cashing of defendant's check to be accord and satisfaction, and finds for the defendant and against the plaintiff, no cause of action.

DATED this 16th day of June, 1992

BY THE COURT:

  
\_\_\_\_\_  
Circuit Judge

MAILING CERTIFICATE

I certify I mailed a copy of the above Ruling, postage prepaid, on June 17, 1992 to the following:

Ron Goodman  
P.O. Box 727  
American Fork, Utah 84003

Dan Whiting  
4692 W. 10000 South  
Payson, Utah 84651

Karen D. Hansen  
Deputy Court Clerk

Provo ....., Utah

..... Feb. 11 ....., 19 88

The undersigned, jointly and severally, promise to pay to the order of . Leonard D. Udell.  
..... 810 N. 1220 W. . ~~XXXX~~ at ..... Provo, Ut. . . . . in .. Utah, county .....,  
Utah, or at such other place as the holder hereof may designate in writing, the sum of Twenty .....,  
Two hundred dollars..... Dollars (\$ 2,200. ....), in ..... successive  
monthly installments of \$..... each, due on the same day of each month commencing  
..... ~~XXXX~~ ....., 19..88.. and continuing until the whole amount thereof has been paid.

The ANNUAL PERCENTAGE RATE is ..... 10 / 10 %.. In the event full amount of  
contract is not paid within  
90 days, Interest will be 10%.

The unpaid balance may be paid in full at any time and any unearned finance charge will be re-  
funded based on the "Rule of 78's."

*All due in 9 months.*

If any installment is not paid in full within 10 days after its due date, a charge may be assessed of  
\$ none ....., or at holder's election, an amount equal to the annual percentage rate stated above  
times the unpaid amount of the installment from the due date of the installment until paid in full.

If the holder deems itself insecure or if default be made in payment in whole or in part of any in-  
stallment at the time when or the place where the same becomes due and payable as aforesaid, then the  
entire unpaid balance, with interest at the annual percentage rate stated above, shall, at the election of  
the holder hereof and without notice of said election, at once become due and payable. In event of any  
such default or acceleration, the undersigned, jointly and severally, agree to pay to the holder hereof  
reasonable attorneys' fees, legal expenses and lawful collection costs in addition to all other sums due here-  
under.

\*\*\* Case MAXI SNEAKER with P-40 Plow and 1981 Chev. (blue) flatbed truck  
serial # 1GBHCJ4M6BJ101875

Presentment, demand, protest, notice of dishonor and extension of time without notice are hereby  
waived and the undersigned consent to the release of any security, or any part thereof, with or without  
substitution.

This note is secured by ☒ ~~Security Agreement~~ ☒ ~~Trust Deed~~ ☒ ~~Mortgage~~ or ~~over title~~  
Truck title. Subject to Bankruptcy Court approval.

PROMISSORY NOTE (Interest)

Feb 11, 1988

LEONARD D. UDELL

The undersigned, jointly and severally, promise to pay to the order of

810 N. 1220 W. in Provo, Utah 84601

Utah, or at such other place as the holder hereof may designate

writing, the sum of Three hundred and fifty dollars Dollars (\$350.00), payable as follows:

together, both before and after judgment, with interest on the unpaid balance thereof from date until paid at the rate of one per cent (1%)  
interest payable as follows:  
per month.

Full amount of principal and interest all due and payable on or before 9 months.

Prepayment of this note with interest to date of payment may be made at any time without penalty.

If the holder deems itself insecure or if default be made in payment of the whole or any part of any installment at the time when or the place are the same becomes due and payable as aforesaid, then the entire unpaid balance, with interest as aforesaid, shall, at the election of the holder and without notice of said election at once become due and payable. In event of any such default or acceleration, the undersigned, jointly and severally, agree to pay to the holder hereof reasonable attorney's fees, legal expenses and lawful collection costs in addition to all other sums due under.

Presentment, demand, protest, notice of dishonor and extension of time without notice are hereby waived and the undersigned consent to the use of any security, or any part thereof, with or without substitution.

\* (Ditch Witch and trailer)

1291 W EST 220 Nc

PROVO UTAH

*Leonard D. Udell*

SECURED INSTALLMENT PROMISSORY NOTE

Provo, Utah  
March 7th, 1988

The undersigned, jointly and severally, promise to pay to the order of LEONARD D. UDELL DBA:  
UDELL CONSTRUCTION, Am. fork in  
Utah, or at such other place as the holder hereof may designate in writing, the sum of  
twenty-five hundred dollars Dollars (\$2,500.), in successive  
monthly installments of \$..... each, due on the same day of each month commencing  
....., 19..... and continuing until the whole amount thereof has been paid.

The ANNUAL PERCENTAGE RATE is 10%. If not paid in full within 3 months  
interest rate will be as stated above.

The unpaid balance may be paid in full at any time and any unearned finance charge will be re-  
funded based on the "Rule of 78's." To be paid in full, with interest and principal  
by November 1988.

If any installment is not paid in full within 10 days after its due date, a charge may be assessed of  
\$....., or at holder's election, an amount equal to the annual percentage rate stated above  
times the unpaid amount of the installment from the due date of the installment until paid in full.

If the holder deems itself insecure or if default be made in payment in whole or in part of any in-  
stallment at the time when or the place where the same becomes due and payable as aforesaid, then the  
entire unpaid balance, with interest at the annual percentage rate stated above, shall, at the election of  
the holder hereof and without notice of said election, at once become due and payable. In event of any  
such default or acceleration, the undersigned, jointly and severally, agree to pay to the holder hereof  
reasonable attorneys' fees, legal expenses and lawful collection costs in addition to all other sums due here-  
under.

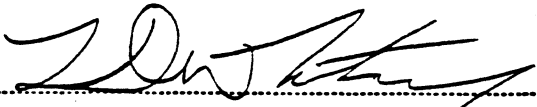
Presentment, demand, protest, notice of dishonor and extension of time without notice are hereby  
waived and the undersigned consent to the release of any security, or any part thereof, with or without  
substitution.

This note is secured by ☐ Security Agreement, ☐ Trust Deed, ☐ Mortgage of even date.

XX Title lien, held on two trucks, (1) 1972 Ford Flatbed truck,  
#F372RN69878

(2) 1967 Chev. Dump truck  
S#HC63362185764

\*\* Subject to Bankrupsey  
approval.

  
.....  
.....

250.00

19

Dan Whiting, DSA Whiting Construct. after date, without grace, for value received  
he promise to pay to the order of Leonard Dean Udell

Two hundred fifty dollars and no/100 DOLLARS, in lawful money of the U. S., with interest at  
te of 10 per cent per ann. from date until paid, both before and after judgment, if any. Interest pay-  
ble Should the interest not be paid as stipulated, the legal holder of this note may declare  
e same due, and proceed at once to collect both principal and interest. In case suit is brought to collect this note  
any part thereof DanWhiting agree to pay a reasonable attorney's fee.

As collateral security for the prompt payment of the above sum and interest, the maker of this note ha-  
delivered to, and deposited with the payee One-half of note due within 2 weeks, from  
his date. ~~XXX~~ Four-wheeled flat trailer. (remaining balance do within  
30 days) Trailer is now in possession of Dan Whiting,

ie market value of which is now \$ 250.00, with the right on the part of the payee from time to time to  
emand such additional collateral security as he may deem sufficient, should the market value thereof decline.  
pon his failure to comply with any such demand this obligation shall forthwith become due, with full  
ower and authority to payee in case of such default or the non-payment of this note at maturity, to sell, assign  
nd deliver the whole or any part of such securities or any substitutes thereof, or additions thereto at any brokers'  
oard or at public auction, or at private sale, at payee's option, at any time or times thereafter, without advertise-  
ment or notice to and with the right on payee's part to become purchaser thereof at such sale or sales,  
reed and discharged from any right or redemption, and after deducting all legal and other costs and expenses for  
ollection, sale and delivery, to apply the residue of the proceeds of such sale or sales so made on this note, return-  
ng the overplus to the undersigned; and he will still remain liable for any amount so unpaid.

100<sup>00</sup> pd on 4/21/88 balance 150<sup>00</sup>  
ck # 1788

X Dan Whiting  
Dan Whiting

mining accommodation status. *Utah Farm Prod. Credit Ass'n v. Watts*, 737 P.2d 154 (Utah 1987). *Mooney v. GR & Assoc.*, 746 P.2d 1174 (Utah Ct. App. 1987).

#### Default judgment.

Failure to reserve rights under Subsection (1)(a) could not be used to set aside default judgments against debtors under Rule 60(b)(6) of the Utah Rules of Civil Procedure, because the subsection does not apply to judgments and the rule applies only where a judgment has been satisfied, released, or discharged and not to questions relating to the merits of the underlying claim. *First Sec. Bank v. Aarian Dev. Corp.*, 738 P.2d 1019 (Utah 1987).

#### Extension of time to pay note.

Where borrower executed two promissory notes in favor of the bank and the borrower's parents as cosigners were accommodation parties, and thus sureties, on the notes, the parents were discharged from further liability on the notes where, after borrower defaulted, the bank and borrower entered into an agreement to extend the time of payment on the notes by means of refinancing and execution of another note without the consent of the parents and without an express reservation of rights; fact that refinancing note may have been invalid would not affect the parents' discharge from liability since it is the agreement that is controlling and not whether the agreement is necessarily binding. *First Nat'l Bank v. Egbert*, 663 P.2d 85 (Utah 1983).

#### Impairment of collateral.

Holder's surrender of securities pledged re-

leases indorser only pro tanto to extent of impairment of security. *Utah State Nat'l Bank v. Livingston*, 69 Utah 284, 254 P. 781 (1927).

#### Partial discharge.

When the person against whom a right of recourse exists is partially discharged, others who are also sureties are also discharged, but only to the extent that the rights have been impaired. *Utah Farm Prod. Credit Ass'n v. Watts*, 737 P.2d 154 (Utah 1987).

#### Waiver.

Language in a guaranty agreement "the liability of the Guarantors shall not be affected, released or exonerated by release or surrender or any security held for the payment of any of the debts hereinbefore mentioned," effectively waived any defense based on impairment of collateral. *Continental Bank & Trust Co. v. Utah Sec. Mtg., Inc.*, 701 P.2d 1095 (Utah 1985).

A provision that defendants "jointly and severally guarantee payment when due of any and all obligations of borrower to bank now existing or which may hereafter arise of whatsoever nature and however represented, whether secured or unsecured" deals with the guarantors' liability for any loans made to the debtor, whether secured or unsecured, not with any waiver relating to collateral. Construed strictly against the bank, it does not explicitly waive any subrogation rights to collateral. *Valley Bank & Trust Co. v. Rite Way Concrete Forming, Inc.*, 742 P.2d 105 (Utah Ct. App. 1987), cert. denied, 765 P.2d 1277 (Utah 1987).

### COLLATERAL REFERENCES

Am. Jur. 2d. — 11 Am. Jur. 2d Bills and Notes § 939.

C.J.S. — 10 C.J.S. Bills and Notes §§ 468, 472 et seq.

A.L.R. — Who is "party" discharged on negotiable instrument to extent of holder's unjustifiable impairment of collateral, under UCC § 3-606(1)(b), 93 A.L.R.3d 1283.

What constitutes unjustifiable impairment of collateral, discharging parties to negotiable instrument, under UCC § 3-606(1)(b), 95 A.L.R.3d 962.

Key Numbers. — Bills and Notes — 256, 301, 437.

### 70A-3-607. Accord and satisfaction.

The negotiation of an instrument marked "paid in full," "payment in full," "full payment of a claim," or words of similar meaning, or the negotiation of an instrument accompanied by a statement containing such words or words of similar meaning, does not establish an accord and satisfaction which binds the payee or prevents the collection of any remaining amount owed upon the underlying obligation, unless the payee personally, or by an officer or employee with actual authority to settle claims, agrees in writing to accept the amount stated in the instrument as full payment of the obligation.